89-1708

NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

JAMES T. KOUNO,

PETITIONER,

V.

OREGON STATE BOARD OF HIGHER EDUCATION; KENNETH L. BEALS; COURTLAND L. SMITH; LYLE D. CALVIN; JOHN V. BYRNE; TOM E. GRIGSBY; LLOYD E. CRISP,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the state university student's diversity suit against his teacher in his capacity as teacher acting in academic freedom, for state law torts and breach of contract in the substance of the teacher's academic conduct with the student, is a suit against the state, barred by the Eleventh Amendment.

2. Whether the Eleventh Amendment bars said suit of the student, where state statutes entitle the teacher to the state university's indemnification for damages awarded against him.

3. Whether the federal court may, on its own motion on F.R.C.P. 12(b)(6), dismiss the state university student's claim of unjust academic dismissal from school, finding, crucially to the action, that a faculty committee rejected the student's thesis effort and terminated him from his degree program, where (1) the student is

suing the teachers in their capacity as teacher acting in academic freedom, for the substance of their academic conduct with him, (2) nothing in the complaint supports the finding, and (3) the student disputes the finding.

4. Whether the federal court may, on its own motion on F.R.C.P. 12(b)(6), dismiss the state university student's claim of unjust academic dismissal from school, on mere consensus of defendant teachers that the student's academic performance in question was inadequate, where (1) the student is suing the teachers in their capacity as teacher acting in academic freedom, for the substance of their academic conduct with him, and (2) the student alleges that a contract existed between him and the teachers as to the minimum required procedure for the determination of his academic performance in question, and that the teachers have

breached the contract, and have not determined his performance in question.

5. Whether Board of Curators of the University of Missouri v. Horowitz, 435 U.S. 78, 98 S.Ct. 948, 55 L.Ed.2d 124 (1978) and Regents of University of Michigan v. Ewing, 106 S.Ct. 507 (1985) should be overruled or clarified, if, and to the extent that, under these decisions of this Court, the answers to questions 1 and 4 above are to be in the positive.

6. Whether Pennhurst State School and Hosp. v. Halderman, 465 U.S. 89, 79 L.Ed.2d 67, 104 S.Ct. 900 (1984), should be overruled or clarified, if, and to the extent that, under this decision of this Court, the answer to questions 2 above is to be in the positive.

LIST OF PARTIES

Plaintiff-Appellant-Petitioner:

JAMES T. KOUNO.

Defendant-Appellee-Respondent:

OREGON STATE BOARD OF HIGHER EDUCATION.

In the following, the individual defendants-appellees-respondents and their Oregon State University academic capacities pertinent herein:

KENNETH BEALS	Professor
COURTLAND L. SMITH	Department Chair
TOM E. GRIGSBY	Grievance panel
LLOYD E. CRISP	Grievance panel
LYLE D. CALVIN	Graduate School Dean
JOHN V. BYRNE	President

The respondents' capacities herein are discussed more extensively under Federal Jurisdiction, under STATEMENT OF THE CASE, below.

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TABLE OF AUTHORITIES

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OPINIONS BELOW

The memorandum opinion the U.S. Court of Appeals for the Ninth Circuit is unreported, and is replicated in Appendix hereto, infra, at pages 46-47.

The Opinion of the District Court for the District of Oregon is unreported, and is replicated in Appendix, at pages 48-55.

The Order of the Appeals Court denying Kouno's petition for rehearing is replicated in Appendix, at page 56.

Kouno's complaint illuminative of the district court's opinion is replicated in Appendix, at pages 57-79.

The order and the Judgment of the District Court, mentioned by the Appeals Court, are replicated at the end of the Appendix.

SUPREME COURT'S JURISDICTION

The memorandum opinion of the U.S. Court of Appeals for the Ninth Circuit (Appendix, page 46) and the notation of a judgement were entered persuant to F.R.A.P. Rule 36, Nov. 15, 1989. Kouno's F.R.A.P. Rule 40 petition for rehearing was timely filed Nov. 29, 1989. The order of the Appeals Court denying a rehearing was filed and entered Jan. 31, 1990. The jurisdiction of the Supreme Court is invoked under 28 USC sec. 1254(1), 2101(c) and 2106, and Supreme Court Rules 13.4 and 29.2.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional and statutory provisions of the United States. Kouno's bold-face capitalization indicates the portion pertinent herein.

28 U.S.C SECTION 1332(a):

The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between-

(1) citizens of different States;

(2) **CITIZENS OF A STATE, AND FOREIGN STATES OR CITIZENS OR SUBJECTS THEREOF**; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

ELEVENTH AMENDMENT:

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

CONSTITUTION I(9)(8):

NO TITLE OF NOBILITY SHALL BE GRANTED

BY THE UNITED STATES: and no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.

CONSTITUTION I(10)(1):

NO STATE SHALL enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; **PASS** any bill of attainder, ex post facto law, or **LAW IMPAIRING OBLIGATION OF CONTRACTS, OR GRANT ANY TILE OF NOBILITY.**

FOURTEENTH AMENDMENT, SECTION 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or en-

force any law which shall abridge the privileges or immunities of citizens of the United States; **NOR SHALL ANY STATE DEPRIVE ANY PERSON OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW**; nor deny to any person within its jurisdiction the equal protection of the laws.

SEVENTH AMENDMENT:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

The Complaint

This is a state common law educational malpractice action, in diversity of citizenship, by petitioner, Kouno, against respondent Oregon State University ("OSU")

teachers in their capacity as teacher acting in academic freedom with him, and against the Oregon State Board of Higher Education ("Board") as the titular head of the teachers in their said capacity, for torts and breaches of contract in the substance of the teachers' academic conduct with Kouno, for Kouno's readmission in OSU, and for recovery of damages from the teachers.

Byrne, OSU President, dismissed Kouno from OSU through a letter dated 05/03/'85, making Kouno's grievances herein ripe for litigation. The original complaint was filed 06/17/1985. The third amended complaint (Appendix, page __) herein pertinent was filed 12/30/1987. Kouno has not waived jury trial. Statutory time limitations do not bar any claim, or at least claims raising the questions herein, in this complaint.

The complaint, ridden of lay pro se

verbiage, conveys the following. The bracketed portions are either implicit in the complaint, or would have, if necessary, become explicit in Kouno's reply to defendants' answer to the complaint.

In a program at OSU toward a Master's degree Kouno had a thesis advising committee ("the committee"). He had also a contract with OSU teachers and with OSU for which they stood. [This contract provided that, on his academic efforts, Kouno would receive from his teachers impartial judgments accompanied by a statement of pertinent grounds which is as objective and definite as customarily expected in a university.] [This provision was buttressed by school rules ("Educational Rights rules") originating in Family Educational Rights and Privacy Act of 1974, 20 U.S.C. 1232g, which entitled Kouno to a formal hearing for irregularities in the evaluation of his academic efforts at OSU.] [In

particular,] the contract provided that, as to the evaluation of his thesis effort, only the committee is to be responsible, and only its voice is to be final. [The contract provided also that, in his academic career, Kouno would receive from his teachers impartial, civil, and sincere treatments generally, considerate of his academic career, which a university customarily supplies to its student.]

Beals, a committee member, represented to Kouno falsely that the committee had decided to grant Kouno a Master's degree, waiving the thesis requirement, and that the committee had decided to terminate Kouno's thesis effort regardless of his response to the alleged proposal. [Through a letter to other committee members, Kouno objected to the alleged decision, and substantially requested the committee's statement of its decision. The committee did not respond.]

Beals arbitrarily resigned from the committee, while the other members remained to reconstitute a committee, pending an availability of a new member.

Beals declared his resignation from the committee in a letter which, unbeknownst to Kouno, to other committee members or to Calvin, who was Beals' immediate superior in the management of the program, Beals issued to the entire faculty of his department, in which Kouno too had an office. In this letter, Beals falsely alleged that Kouno was academically dishonest, falsely stated that Kouno had failed the degree program, and divulged privileged information whose publication was highly embarrassing to Kouno.

The day following the above incident, Smith, the department chair, issued Kouno a letter. In said letter, without informing Kouno of said letter of Beals, Smith stated that Kouno was no longer to

seek academic aegis in the department, as the department was devoid of pertinent academic expertise, and that Kouno was to vacate his space in the department. Kouno was forced to do so.

[Upon a fortuitous discovery of Beals' letter ten days later, Kouno issued a letter to Calvin and the other committee members, rebutting Smith's various false representations in his letter and Beals' allegations in his letter, and expressing his readiness to accept any regularly made and issued decision of the committee.]

Approximately six and half months after the incidents involving Beals and Smith, [six months, incidentally, being the time period allowed for filing the notice of tort claims against state agents,] Calvin dismissed Kouno from OSU. Calvin alleged as his ground that Kouno's academic progress was inadequate, but did not supply any statement of pertient grounds

for his allegation.

The above account comprehends all essential events preceding Calvin's action. Grigsby, Crisp, and Byrne subsequently endorsed Calvin's action, in the process adding to the willful disregard of impartiality, civility, sincerity, considerations for the student's academic career, and definiteness of grounds, for Kouno at OSU. In particular, in spite of Kouno's prompting, Byrne did not provide him any formal hearing. Kouno was to find only later the teachers' rationale which is herein below apparent.

Basis for Federal Jurisdiction

The jurisdiction of the district court was invoked on diversity of citizenship and amount in controversy, under 28 U.S.C. 1332.

The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars.

Kouno is a citizen of Japan.

In all incidences recounted in the complaint, the defendant teachers acted as members of OSU faculty, in academic/educational transactions with Kouno, in their capacity as teacher performing the substance of their academic conduct with him. Kouno is contending, as below, that, as sued by Kouno, in their said capacity, for their said deeds, they are purely in their individual capacity. Therefore, they are herein merely citizens of the State of Oregon.

Oregon Revised Statutes ("O.R.S.") 351.070(f) empowers and obliges the Board to confer academic degrees on the recommendation of the OSU faculty. Where an academic recommendation of the faculty to the Board concerning a student is put in question by the student in the court, Kouno thinks, O.R.S. 351.060(6) empowers, and the student may oblige or honor, the

Board to be in the court. Kouno is invoking this purely symbolic function of the Board.

The lower courts have not not reached Kouno's above theory regarding the Board for consideration. Therefore, Kouno believes, the Board's defendantship in this context is presently not at issue.

In his prayer for relief, under paragraph 17 of the complaint, Kouno speaks of O.R.S. 183. In paragraph 34, he equates Oregon admnistrative rules with OSU rules. In paragraph 58, he speaks of O.R.S. 351.070(2). In all instances lay pro se Kouno means OSU rules which are the correlative of the respective Oregon statutes or administrative rules at OSU. (These passages put the defendants on notice of these intentions of Kouno, though they should be amended to show them explicitly.) These passages should not be construed to indicate Kouno's intention to

sue government administrators, or to bind OSU teachers performing the substance of their academic conduct, with mere governmental regulations. (This has been specifically pointed out to the Appeals Court. Opening Brief, filed 01/03/1989, pages 19, 29-30.)

(O.R.S. 30.265(1) provides for the Board's damage liability, in some circumstances, to the tort claimant against its employees. As below, the Board is not a party in real interest in this controversy. (If it is, then it is a corporation suable in the federal court for damages.) If this statute applies in this case, then, in its context, the Board should be deemed Kouno's insurer.

(If the statute presently applies, if it proves in the federal court that Kouno has been damaged, and if it proves necessary for him to sue the Board for the damage recovery, he might, thereupon, do

so, but in the state court, since, as Kouno's insurer, with respect to Kouno, the Board is a state agency. The statutory prerequisites for this hypothetical suit have been satisfied by the timely appearance of the Oregon State Attorney General in this case, and his asserted defense of the Board in its liability to the teachers for an indemnification.)

Rule 12 Motion

The defendants had never disputed the allegations of the complaint. At least, they had never disputed them in any pleading requiring a responsive pleading from Kouno. (F.R. 8(d)).

The defendants entered a Rule 12 motion to dismiss. Therein presently pertinent is only the F.R. 12(b)(1) motion, lack of subject matter jurisdiction.

The OSU teacher draws stipends through the Board. The Oregon Supreme Court found the Board to be a state agen-

cy, in a suit on contract by a construction company against the Board for a payment. From these facts the defendants would conclude, in effect, that the OSU teacher's academic conduct with his student is, in its substance, to the student, within the scope of the teacher's employment by the state. Thus arguing, they would raise the Eleventh Amendment as a bar to this action in the federal court.

Also, in a response (C. R. 147) to Kouno's reply to the motion, the defendants assert that the defendant teachers are entitled to the Board's indemnification, in this case, and, citing Pennhurst State School and Hosp. v. Halderman, 465 US 89, 79 L Ed 2d 67, 104 S Ct 900 (1984), they argue that this makes the state the real party in interest.

Kouno countered the defendants with points whose essences are indicated below, under REASONS FOR GRANTING THE WRIT.

The Ruling

The district court granted the motion, upholding the defendants' reasonings.

The Judgment (Appendix, page 81) represents that the court granted the defendants' Rule 12(b)(1) motion, and the Opinion (Appendix, pages 48) indicates that the court did so, deeming the defendant teachers as state employees vis-a-vis Kouno, in the substance of their academic conduct with him. But, this is not the totality of the court's decision, as follows.

The court finds (1) that Kouno's academic progress was inadequate (Appendix, page 49), and (2) that the committee rejected Kouno's submitted thesis and terminated him from the program (Appendix, page 50). Thus, the court, in effect, rules on a Rule 12(b)(6) (or Rule 56) motion of its own, on facts relating to the substance of

the defendant teachers' academic conduct with Kouno, for the teachers in their capacity as teacher acting in academic freedom with him. The complaint does not supply any ground for this.

Confused by these findings, and thereby made uncertain of the meaning of the Judgment, Kouno entered a timely Rule 52(b) motion, requesting the court to clarify the meaning and the basis of the findings. The court denied the motion, deeming it a Rule 60 motion for a relief from the Judgment.

Appeal

Kouno appealed from the Rule 12(b)(1) dismissal, the Rule 12(b)(6) dismissal, and the postjudgment action of the district court. The appeal was timely from the denial of the Rule 52(b) motion, but not necessarily timely from the Judgment.

Kouno presented to the Appeals Court points whose essences are indicatd below.

The appellees repeated their Eleventh Amendment arguments.

The appeals court reached the Judgment for consideration on the merits.

The memorandum opinion of the appeals courts (Appendix, page 46) states merely that the appeals court affirms the district court's judgment "for the reasons stated in the district court's opinion and order."

Kouno's timely petition for a rehearing, with a suggestion for a rehearing en banc, was denied.

REASONS FOR GRANTING THE WRIT

Professor' Personal Liability

IMPORTANT QUESTIONS OF FEDERAL LAW.

Actions of the teacher in the governmentally established school with his student, within the ambit of his professional expertise or discretion, are matters of his personal freedom and respon-

sibility, not matters of his duty to the government, which the government can perform itself, modify, or undo. This has been established by this Court, under the rubric of academic freedom doctrine, on the basis of the First Amendment. Sweezy v. State of New hampshire, 354 U.S. 234, 249-250, 260-264, 77 S.Ct. 1203 (1957); Keysian v. Board of Regents of University of State of New York, 385 U.S. 589, 603, 607, 67 S.Ct. 675 (1967); Epperson v. Arkansas, 393 U.S. 97, 104-105, 89 S.Ct. 266 (1968); University of California Regents v. Bakke, 438 U.S. 265, 312, 98 S.Ct. 2733, 57 L.Ed2d 750 (1978); Regents of University of Michigan v. Ewing, 106 S.Ct. 507, note 12 (1985). Lower courts' understandings of the doctrine have been unerring. Keefe v. Geanakos, 418 F.2d 359 (1st Cir. 1969); Parducci v. Rutland, 316 F.Supp. 352 (1970); Mailloux v. Kiley, 323 F.Supp. 1387 (1971), aff'd 448 F.2d 1242

(1st Cir. 1971); Sterzing v. Fort Bend Independent School, 376 F.Supp. 657, 662 (S.D. Tex. 1972), aff'd, 496 F.2d 92 (5th Cir. 1974); Minarcini v. Strongsville City School District, 541 F.2d 577 (6th Cir. 1976); Durham v. Parks, 564 F.Supp. 244 (1983); Parate v. Ishibor, 868 F.2d 821 (6th Cir. 1989). The purpose of the doctrine is to preserve uninhibited exchange of ideas among teachers and students in the governmentally established school. Ewing, supra, note 12.

By the terms of the academic freedom doctrine, or, rather, as the courts have come to recognize in the doctrine, the teacher in the governmentally established school acts on his own design and accord, unprompted and unperturbed by the state, in his own individual dignity and capacity, vis-a-vis his student, in the substance of his academic conduct with the student. To this extent the teacher

should be in his individual capacity responsible and liable to his student, whether in the state or federal court.

For the purpose of compensation or indemnification by the government, the teacher in the governmentally established school should, at times, while academically acting with his student, be regarded an employee of the government, with respect to damages or liabilities which he may sustain or incur accidentally, by the hand of others, or through his own error or failure. But, this notion applies only when the teacher is essentially a passive victim in a circumstance in which the government has affirmatively placed him. This notion is unmindful of the teacher's academic relationship with his student. In particular, it is unmindful of the teacher's rightly unquestioned and rightly unmitigated control, unprompted and unperturbed by the government, purely in his

own individual dignity and capacity, over the substance of his academic conduct with his student, wherein may arise his student's claims against him. The government has no affirmative part either in the teacher's winning or in his losing in his student's suit against him for his said deed. Therefore, the above indicated notion presently has no pertinence.

The government employee receives stipends and other benefits from the government. But, stipends and other benefits from the government do not prove a government-employeeship in the recipient. In the substance of his academic conduct with his student, the teacher in the governmentally established school is not an employee of the government, but its sponsee for his service not to the government, but to his student. His duties are to the student, not to the government. Only the student, not the government, can enforce

them.

In all incidences recounted in the complaint, the defendant teachers acted in their capacity as Kouno's teacher performing the substance of their academic conduct with him. Kouno sued the teachers in their said capacity, for their said deed. The litigants and the courts below are as one on these points.

The courts below hold, in effect, that the state school teacher in his capacity as teacher acting in academic freedom is a state agent vis-a-vis his student, with the immunity of the sovereign state from suits by the student, in the substance of his academic conduct with the student. This presents important questions of federal law, in its clashes with the academic freedom doctrine, as follows.

(1) The lop-sided privileging of the teacher in the governmentally established school over his student would greatly in-

hibit exchange of ideas among students and teachers in the school. It would also breed cynicism over scholarship not only in the governmentally established schools, but also in all schools and other arenas of intellectual activities. It is thus pernicious, and intolerable.

(2) This Court has expressed its concern over the possibility of the above indicated development in the present state of this Court's rulings. Namely, it noted that academic freedom of the teacher in the governmentally established school and the lack of his student's recourse against him in the government is somewhat inconsistent with the purpose of the academic freedom doctrine. Ewing, supra, note 12. This unresolved and unelucidated inconsistency, in practice, in the doctrine creates uncertainties in the notion of the student-teacher relationship. This distresses not only students in governmental-

ly established schools who face academic confrontations with their teacher, but all in any academia who variously rely on the guidance of the doctrine in their relationship with others.

(3) The holding of the lower courts is inimical to:

(a) U.S. Constitution I(9)(8) and I(10)(1), which would forbid respectively the U.S. and the states to make the title of teacher in the governmentally established school a title of nobility in any sense or degree, for any reason.

(b) The Fourteenth Amendment, which would forbid the state to deprive without due process of law the liberty and property rights of the student in the governmentally established school, which rights of the student would be inherent in his suit against his teacher.

(c) 28 U.S.C. 1332 and the Seventh Amendment, guaranteeing Kouno a jury trial

in the federal court to determine the liability of the defendant teachers.

(d) Constitution I(10)(1), which would protect from the state's interferences Kouno's rights on a contract vis-a-vis the defendant teachers.

CONFLICT WITH DECISION OF THIS COURT

The lower court's refusal to deem Kouno's action as against the defendant teachers in their individual capacity, or their refusal to deem it viable as such, is contrary to Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99 (1957), which requires, on rule 12 motion, a search for any reasonable construction of the complaint making relief a possiblity. F.R. 8(f).

State Indemnification

IMPORTANT QUESTION OF FEDERAL LAW.

The courts below hold that O.R.S. 30.285(1) obliges the Board to indemnify the teachers, and that, under Pennhurst, this is in itself sufficient to raise the

Eleventh Amendment bar against this action. This is wrong, as follows.

The Board is not a party in this controversy. If O.R.S. 30.285(1) presently applies, then, with respect to Kouno, the Board should be deemed the teachers' insurer and a citizen of the State of Oregon, as in 28 U.S.C. 1332(c).

Thus, federal courts have held that, in the absence of probable state sovereignty in the defendant, the state's indemnifying the defendant for damages does not make the suit one against the state. Landry v. Odom, 559 F.Supp. 514, 516-517 (E.D.La 1983); Davis v. Harris, 570 F.Supp. 1136, 1139 (D.Or. 1983).

Underpinning this rule, Pennhurst states, especially at 101-102, 107-109, 465 U.S.; 908-909, 911-912, 104 S.Ct., that the Eleventh Amendment relates to state sovereignty in the alleged wrong or in the relief sought. Presently there is

no probable state sovereignty in the wrong of the teachers, and there is no probable state sovereignty in the relief sought in them. The lower courts' reliance on Pennhurst is misplaced, or Pennhurst is in need of a clarification.

Similarly as above, the holding of the lower courts is inimical, in four counts, to U.S. Constitution I(9)(8) and I(10)(1), the Fourteenth Amendment, and the Seventh Amendment.

Finding re Committee

Crucially to their dismissing, on its own motion on F.R. 12(b)(6), Kouno's action, the lower courts find that the thesis advising committee rejected Kouno's thesis effort and terminated him from the program. This finding has no support in the complaint, and was disputed by Kouno.

IMPORTANT QUESTION OF FEDERAL LAW.

This is a common law action. Kouno has demanded a jury trial. The courts'

unsupported finding deprives Kouno of his right to a jury trial guaranteed by the Seventh Amendment.

CONFLICT WITH DECISION OF THIS COURT

The finding is contrary to Gardner v. Toilet Goods Assocation, 387 U.S. 167, 87 S.Ct. 1526 (1967), which requires, on rule 12 motion, an acceptance of the allegations of the complaint and supporting affidavits as true.

COURTS' DEPARTURE FROM USUAL COURSE

In dismissing, on its own motion on F.R. 12(b)(6), Kouno's action, the lower courts considered matters outside the complaint, without supplying Kouno F.R. 56 summary judgment procedure required under F.R. 12(b).

Professors' Consensus as Their Defense

Crucially to their dismissing, on its own motion on F.R. 12(b)(6), Kouno's action, the lower courts find that Kouno's

academic performance was inadequate. This finding has no support in the complaint, and was disputed by Kouno. The courts' only possible ground is the defendants' consensus evident in the record.

This suit concerns whether, under the contract between Kouno and the teachers, the teachers are entitled to make herein allegations concerning Kouno's academic performance in question. It does not concern whether they are correct in their allegation. If they have satisfied the contract, they are entitled to make herein any allegation conforming with their official academic findings and opinions, regardless of its correctness. Kouno's source of remedy, if needed, would be the academic world, not the court. The courts must know this.

Thus, in upholding the teachers' allegation, the courts below do not mean that the teachers are correct in their

allegation, but that they are entitled to make the allegation, and that their allegation binds the court.

IMPORTANT QUESTION OF FEDERAL LAW.

In thus ruling, the courts rule, in effect, that the teachers' consensus that they satisfied the contract is their complete defense against Kouno's claim that they have not. The courts thus deem the teachers themselves, rather than a jury, as the rightful arbiter. This is contrary to the Seventh Amendment guaranteeing a jury trial.

CONFLICT WITH DECISION OF THIS COURT.

The finding is contrary to Scheuer v. Rhodes, 416 U.S. 232, 40 L.Ed.2d 90, 94 S.Ct. 1683 (1974), which requires, on rule 12 motion, a construction of the complaint favorably to the pleader, and, in particular, forbids acceptance of the defendant's allegations of facts or of his good faith as true.

COURTS' DEPARTURE FROM USUAL COURSE.

F.R. 52(a) states that, in actions tried without a jury, the court shall find facts specially and state separately its conclusions of law thereon. This requirement applies to Rule 12 dismissals of action, except where the complaint and the rule 12 motion, in effect, state the court's factual and legal grounds. Williamson v. Tucker, 645 F.2d 404, 410-411 (5th Cir. 1981).

The courts did not state with any reliable precision the capacity of the defendants with respect to Kouno, i.e., whether state agent or academic authority, as to which they made the finding, and dismissed Kouno's action. Also, they did not state with any reliable precision the process through which they reached the finding. This precludes Kouno's rational understanding of the court's action, and is contrary to the F.R. 52(a) requirement.

'Horowitz' and 'Ewing'

The only imaginable source of inspiration for the above finding and the Judgment of the lower courts is Curators of University of Missouri v. Horowitz, 435 U.S. 78, 55 L.Ed.2d 124, 98 S.Ct. 948 (1978), and Ewing, supra.

Students sued state university teachers in their capacity as person acting under color of state law, or as state agent deemed to be overseeing his own academic conduct, for their alleged misfeasance. The teachers offered as their defense their consensus, in a reasonable semblance of good faith and regularity to the disinterested public, in their capacity as teacher acting in academic freedom with his student, that they had done their academic duty to the student. Horowitz states, in effect, that, in these cases, the consensus of the teachers is the defendants' complete defense. Ewing, 106

S.Ct., at 514, states that the federal court is not the forum to evaluate the substance of the multitude of academic decisions made daily by faculty members of public educational institutions. As Kouno understands, these statements of this Court are to disparage students' insensible and insensitive invocation of the U.S. and the state in their disputes with teachers in the free academia, against the teachers' academic freedom. Also, both Horowitz and Ewing appear to Kouno to chide students for their attempt to use the U.S. and the state as their patsy, and to admonish them to face the jury in an honest common law action, rather than trifle with the judge for rights or privileges which they do not have, or which they would have to prove to a jury in any case. Kouno fails to find in these decisions any inkling of the lower courts' holding now in question.

IMPORTANT QUESTIONS OF FEDERAL LAW

But, if, in Horowitz and Ewing, this Court is intent on deeming the state university teacher as the sovereign state vis-a-vis his student, in the substance of his academic conduct with the student, or if this Court is intent on thus licensing the teacher as a legal chameleon switching between the conflicting capacities as suits him at the instant of complaint, at will evading the complaint, or if the decisions are thus construable by lower courts, this Court should overrule or clarify the decisions as inconsistent with the academic freedom doctrine, and inimical, in four counts, to the Seventh Amendment, Constitution I(9)(8) and I(10)(1), and the Fourteenth Amendment, as argued above. At least, this Court should clarify them in such a way as to forstall these constitutional objections.

CONCLUSION

All objections essential herein, in facts or law, have been presented to both courts below.

The questions of federal law herein presented are novel, substantial and meaningful. Unless resolved by this Court, they will surely involve in vain numerous future plaintiffs, at their great loss of time and money.

For their intricacy and subtlety, the merits of petitioner's contentions require his dedicated and careful presentation.

Wherefore, petitioner respectfully pray that a writ of certiorari be granted.

Respectfully submitted

James T. Kouno
Petitioner pro se
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TEL (503) 758-9314

(ENTERED NOV 15, 1989)

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES T. KOUNO, Plaintiff-Appellant,	NO. 88-4185 D.C. NO. CV-85-6227-PA
v.	MEMORANDUM*
OREGON STATE BOARD OF HIGHER EDUCATION; KENNETH L. BEALS; COURTLAND L. SMITH, LYLE D. CALVIN; JOHN V. BYRNE; TOM E. GRIGSBY; LLOYD E. CRISP, Defendants- Appellees.	

Appeal from the United States
District Court
for the District of Oregon
Owen M. Panner, Chief Judge, Presiding

Submitted October 25, 1989**
Portland, Oregon

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The panel unamnimously finds this case suitable for submissin on the record and briefs and without oral argument. Fed. R. App. P. 34(a), Ninth Circuit Rule 34-4.

Before: ALARCON, O'SCANNLAIN, and LEAVY, Circuit Judges.

James T. Kouno ("Kouno"), a Japanese citizen, appeals the district court order granting a motion by the Oregon State Board of Higher Education ("Board") to dismiss his state law action for lack of subject matter jurisdiction. Kouno's action arose from his termination by defendants from a graduate program at Oregon State University. The district court held that the defendants were immune from suit under the eleventh amendment, citing Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984). After a review of the entire record, we affirm the judgment for the reasons stated in the district court's opinion and order filed June 8, 1988.

AFFIRMED.

(NOT SIGNED)

(FILED JUNE 8, 1988,
ENTERED JUNE 10, 1988)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

JAMES T. KOUNO,	)	
	)	
Platintiff,	)	Civil No.
	)	85-6227-E
v.	)	
	)	OPINION
OREGON STATE BOARD	)	
OF HIGHER EDUCATION,	)	
KENNETH L. BEALS,	)	
COURTLAND L. SMITH,	)	
TOM E. GRIGSBY,	)	
LLOYD E. CRISP,	)	
LYLE D. CALVIN, and	)	
JOHN V. BYRNE,	)	
	)	
Defendants.	)	
----------	)	

James T. Kouno
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Pro Se Plaintiff

Dave Frohnmayer
Attorney General
Thomas K. Elden
Assistant Attorney General
Department of Justice
450 Justice Building
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Attorneys for Defendants

PANNER, J.

Plaintiff James T. Kouno is a graduate student who was terminated from a program at Oregon State University (OSU). On December 18, 1986, I dismissed all federal civil rights claims with prejudice but allowed plaintiff to file a second amended complaint specifying whether he sought to invoke diversity jurisdiction. He filed a second amended complaint. It was found to be in violation of the court's order to be brief. On December 30, 1987, he filed a third amended complaint. On January 22, 1988, defendants moved to dismiss. I grant the motion.

BACKGROUND

Defendants are Oregon State Board of Higher Education and various professors and administrators. Plaintiff is a citizen of Japan and a resident of Oregon. Plaintiff did not make adequate academic progress in his master's program in an-

thropology at OSU. In May 1984, his 350-page paper was unanimously rejected by a faculty committee as unsatisfactory for completion of the thesis requirement. Plaintiff appealed his termination from the graduate school. The appeal board unanimously upheld the termination. The dean and the president of the university also upheld the termination.

Plaintiff alleges breach of contract, outrageous conduct, fraud, invasion of privacy, defamation, and conspiracy. Defendants move to dismiss for lack of subject matter jurisdiction. They also move to dismiss for failure to give tort notice and, as to two defendants, failure to file within the statute of limitations.

STANDARD

On a motion to dismiss for failure to state a claim, the court must review the sufficiency of the complaint. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). The

court should construe the allegations in the complaint most favorably to the pleader.

> In evaluating the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in suport of his claim which would entitle him to relief.

Conley v. Gibson, 355 U.S. 41, 45-46 (1957). For the purpose of the motion, the complaint is liberally construed in favor of the plaintiff and its allegations are taken as true. Rosen v. Walters, 719 F.2d 1422, 1424 (9th Cir. 1983).

DISCUSSION

This suit no longer involves constitutional, but only state claims. When no constitutional claims are involved, the eleventh amendment bars a suit against state officials when the state is the real, substantial party in interest. Pennhurst State School and Hosp. v. Halderman, 465 U.S. 89 (1984). Unless a

state's sovereign immunity is waived or abrogated by Congress, this court does not have subject matter jurisdiction. Id, at 98.

Defendants contend that this suit is in reality one against state employees in their official, not individual, capacities, and that therefore the state is the real party in interest and the suit is barred as to all defendants. They point out that ORS 30.285(1) requires the state to reimburse officials for liability arising out of the performance of their duties.

> When the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.

Ford Motor Co. v. Department of Treasurery, 323 U.S. 459 (1945), cited in Edelman v. Jordan 415 U.S. 651, 663 (1974).

Plaintiff essentially concedes that OSU is an arm of the state, but he argues that the officials are fundamentally independent from the state. He cites Sweezy v. New Hampshire, 354 U.S. 234 (1957), which concerned the legislative limits of inquiry regarding a state university faculty member who refused to answer certain questions regarding political affiliations. He cites a similar case, Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967), which concerned teacher loyalty oaths. He cites Epperson v. Arkansas, 393 U.S. 97 (1968), which concerned the constitutionality of a statute prohibiting the teaching of evolution. Finally, he cites Board of Curators v. Horowitz, 435 U.S. 78 (1978), which concerned the adequacy of constitutional due process in an academic setting when a student is terminated from a program. These cases stand for certain legislative restrictions or

constitutional imperatives in the academic arena. They do not, as plaintiff suggests, stand for the proposition that faculty members are not agents of the state.

The Oregon Supreme Court has held that an action against the State Board of Higher Education is in reality an action against the state. James & Yost, Inc. v. State Bd. of Higher Educ., 216 Or. 598, 340 P.2d 577 (1959). See also Banerjee v. Roberts, 641 F. Supp. 1093, 1098 (D. Conn. 1986) (University of Connecticut was an arm of the state and claim against trustees in their official capacities dismissed because of eleventh amendment immunity).

The individual defendants in this case are plaintiff's academic advisor, the chair of the anthropology department, the dean of the graduate school, the president of OSU, and the professors who heard plaintiff's academic appeal. Plaintiff's

complaint against the individual defendants is couched in terms of personal offense, humiliation, and invasion of privacy. Nevertheless, it is evident from the complaint that all claims derive exclusively from plaintiff's academic performance and the faculty's response to it. I find the individual defendants to be nominal defendants only, that they acted as agents of the state, and that the state is the real party in interest.

CONCLUSION

Defendant's motion to dismiss this action for lack of subject matter jurisdiction is granted.

DATED this 8 day of June, 1988.

(SIGNED)

Owen M. Panner
United States District Judge

(ENTERED JAN 31, 1990)

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

James T. Kouno,	)	NO. 88-4185
	)	
Plaintiff-	)	D.C. NO.
Appellant,	)	CV-85-6227-PA
	)	
v.	)	ORDER
	)	
OREGON STATE BOARD OF HIGHER EDUCATION; KENNETH L. BEALS; COURTLAND L. SMITH; LYLE D. CALVIN; JOHN V. BYRNE; TOM E. GRIGSBY; LLOYD E. CRISP,	)	
	)	
Defendants-Appellees.	)	

Before: ALARCON, O'SCANNLAIN, and LEAVY, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED. (NOT SIGNED)

(FILED DEC 30, 1987)

James T. Kouno, Plaintiff Pro Se
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

James T. Kouno,	Civil No. 85-6227-E
Plaintiff	
v.	THIRD AMENDED COMPLAINT
Oregon State Board of Higher Education, and	Breach of contract
Kenneth L. Beals, Courtland L. Smith,	Defamation
Tom E. Grigsby Lloyd E. Crisp	Fraud
Lyle D. Calvin, John V. Byrne, in their individual capacity and in their capacity representing OSU as an educational institution	Outrageous conduct Invasion of privacy Conspiracy
Defendants	Demand for Jury Trial

FIRST COUNT

[The Board and defendants

in representative capacity]

(Breach of Contract)

Kouno, for his First Claim for Relief, alleges:

1. Plaintiff, Takaoki Kouno, AKA James T. Kouno, is a citizen of Japan, residing in the city of Corvallis, County of Benton, State of Oregon. The defendants are a public corporation and citizens of the State of Oregon. The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars. Jurisdiction is founded on diversity of citizenship and amount in controversy, under 28 U.S.C. 1332.

2. Defendant Oregon State Board of Higher Education is constituted a corporation pursuant to O.R.S. 352.240, and is empowered with the general government of

Oregon State University ("OSU") in the City of Corvallis, County of Benton, State of Oregon.

3. Defendants Kenneth L. Beals, Courtland L. Smith, Lyle D. Calvin, Tom E. Grigsby, Lloyd E. Crisp and John V. Byrne are all residents of the State of Oregon, and at all times mentioned herein acted as members of the educational faculty of OSU, with titles or capacities denominated hereinafter.

4. At all times material herein, Kouno was an OSU student in good standing in OSU Master of Arts in Interdisciplinary Studies program ("MAIS program"), and stood to receive an MAIS degree upon the completion of his thesis project, the sole unfulfilled degree requirement.

5. The power, the responsibility, and the opportunities to make judgements upon Kouno's thesis effort rested exclusively in Kouno's MAIS Thesis Advising

Committee, by a contract between Kouno, OSU, and the committee members, per the mores of academia and OSU rules.

6. The four members of the committee ("thesis advisors") represented three OSU departments and the graduate school.

7. The administrative authority over the committee rested solely in the dean of the graduate school.

8. Defendant Beals represented the anthropology department in the thesis advising committee, and was the chair of the committee and Kouno's "Major" advisor.

9. In June, 1984, Beals willfully withdrew his academic aegis from Kouno, without approval by Kouno, the committee or the dean.

10. With the understanding of Calvin, the dean of the graduate school, Kouno continued in his MAIS thesis effort, for the time being without the "Major" advisor/thesis advising committee chair.

11. January 7, 1985, Calvin suddenly terminated Kouno from the graduate school despite Kouno's protest, in abuse of his administrative authority, without academic authority, and without supporting his alleged academic grounds with evidence.

12. Pursuant to OSU rules, Kouno appealed to a grievance committee which consisted of Grigsby, Crisp and a student.

13. In February, 1985, Grigsby and Crisp upheld Calvin, without asserting any academic or disciplinary ground, and without supplying to Kouno any written statement of their grounds.

14. Pursuant to OSU rules, Kouno appealed to Byrne, the OSU president.

15. In informal but unequivocal terms, Kouno requested Byrne to supply some formal proceeding definitively establishing Kouno's rights or faults if any.

16. Through a letter to Kouno, dated

May 3, 1985, received on May 7, Byrne upheld Calvin, without any statement of his grounds.

17. To date, no specific academic fault or disciplinary charge has been formally or officially found or brought against Kouno by any OSU authority. Kouno has not waived any procedural right.

WHEREFORE, Kouno demands that the court adjudge that OSU reinstate Kouno in the MAIS program, supply Kouno a four-member thesis advising committee or its equivalent, and, through the authority of such a body, officially process Kouno's MAIS career. Alternatively, Kouno demands that, if the court deems it proper, the court cause OSU to supply Kouno a contested case hearing of O.R.S. chapter 183 on the matter hereinabove described.

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SECOND COUNT

[Beals, in individual capacity]

(Breach of Contract, Libel

and Outrageous Conduct)

For his Second Claim for Relief, Kouno realleges paragraphs 1 through 9 of this complaint, and further alleges that:

18. Beals resigned from his mentorship with Kouno through means of a two-page letter ("Beals letter"), dated June 5, 1984, which, without Kouno's knowledge, Beals issued to, and only to, the anthropology chair and all of the anthropology faculty.

19. An anonymous party forwarded the Beals letter to Harold R. Parks, Kouno's thesis advisor representing the mathematics department, and through him the existence and content of the Beals letter came to Kouno's attention on June 16, 1984.

20. The anthropology chair or facu-

lty did not have any responsibility or authority, and had not had any opportunity, in the supervising or evaluation of Kouno's thesis effort. They had no "legitimate educational interest" in the meaning of O.R.S. 351.070(3) in Kouno's thesis effort.

21. The Beals letter falsely alleges (in p. 1, pars. 1, 4, 5 of the Beals letter) that an act of Kouno's thesis advising committee had been (1) a decision to terminate Kouno's MAIS thesis effort, giving Kouno an MAIS degree by resolution, that (2) it was unanimous, that (3) it was official, and that (4) Kouno knew that it was such.

22. The Beals letter falsely alleges (p. 1, par. 6) that, in a research report to the thesis advising committee, Kouno defamed authors with whom he disagreed, and ignored or belittled evidence in literature contradicting his theory.

23. The Beals letter falsely alleges (p. 2, par. 2) that Kouno had attempted to coerce or induce the thesis advising committee members to approve Kouno's thesis effort, through some threats or uncivil speeches.

24. The Beals letter falsely alleges that Kouno was uncivil or recalcitrant in academic dealings with Beals (p. 1, par. 6; p. 2, par. 4).

25. In thus acting against Kouno, Beals was willfull and malicious.

26. The false allegations of the Beals letter annihilated substantial opportunities Kouno had in the anthropology department to further his academic purpose even without Beals' help.

27. The Beals letter's frustration of Kouno's academic purpose, and future frustrations which it threatened, produced in Kouno great mental distress.

WHEREFORE, Kouno demands that the

court award Kouno, against Beals, $10,000.00 (ten thousand dollars) for general mental distress, and $10,000.00 (ten thousand dollars) as punitive damage.

COUNT THREE

[Beals, in individual capacity]

(Breach of Contract, Invasion of Privacy and Outrageous Conduct)

For his Third Claim for relief, Kouno realleges paragraphs 1 through 9, and 18 through 20, of this complaint, and further alleges that:

28. The Beals letter disclosed "two (anthropology) faculty meetings," of which Kouno was unaware, and the transactions therein.

29. The Beals letter disclosed Kouno's frustrated academic career prior to his enrollment in the MAIS program.

30. The Beals letter disclosed (p. 1, par. 3) statements of thesis advisors

concerning Kouno, of which Kouno was unaware.

31. The Beals letter disclosed (p. 1, par. 4) a physical stigma in Kouno's cranial bones.

32. The Beals letter dislosed (p. 1, par. 5) a portion of Kouno's privileged academic writing.

33. The Beals letter disclosed Beals' judgement of Kouno's ability and character.

34. These disclosures breached Kouno's confidence not only against the mores of academia, but also against specific provisions of O.A.R. Chapter 576, i.e., OSU rules.

35. The Beals letter disclosures were designed to embarrass Kouno before the recipients of the letter, and did do so.

36. Beals' contempt of Kouno's privacy, and the damage which the disclosures

had caused and the future damages which they threatened, produced in Kouno great mental distress.

WHEREFORE, Kouno demands that the court award Kouno, against Beals, $10,000.00 (ten thousand dollars) for general mental distress, and $10,000.00 (ten thousand dollars) as punitive damage.

COUNT FOUR

[Smith, in individual capacity]

(Breach of Contract,

Fraud and Outrageous Conduct)

For his Fourth Claim for Relief, Kouno realleges paragraphs 1 through 9, 18 through 25, and 28 through 35 of this complaint, and further alleges that:

37. In May, 1984, Beals falsely purported to Kouno that Kouno's thesis advising committee had decided to give Kouno an MAIS degree by resolution, without regard to Kouno's thesis work, so as to terminate

Kouno's thesis effort and MAIS career.

38. June 6, 1984, one day after the issuance of the Beals letter, Smith, then the chair of the anthropology department, issued to Kouno a letter ("Smith letter"). In this letter:

(a) Smith made the department's further aegis for Kouno contingent upon Kouno's acquiescence with the resolution alleged by Beals to have been made by the committee.

(b) Smith purported that the department could not help Kouno because its faculty, including Beals, lacked knowledge in Kouno's research topic.

(c) Smith demanded and so compelled Kouno to forthwith vacate his office space in the department.

39. In this letter, Smith did not disclose to Kouno either the existence or the content of the Beals letter.

40. In complying with Smith's request to vacate office, Kouno relied on the purported candor of Smith's representation regarding the department's uselessness to Kouno.

41. Said dealing of Smith with Kouno was willful and malicious.

42. Smith's conduct annihilated the substantial opportunities Kouno had in the anthropology department to pursue his academic purpose even without Beals' help.

43. Smith's frustration of Kouno's academic purpose, his disregard of Kouno's right not to be lied to, and his contempt of Kouno's sensibilities produced in Kouno great mental distress.

WHEREFORE, Kouno demands that the court award Kouno, against Smith, $10,000.00 (ten thousand dollars) for general mental distress and $10,000.00 (ten thousand dollars) as punitive damage.

/////

COUNT FIVE

[Calvin, in individual capacity]

(Breach of Contract

and Outrageous Conduct)

For his Fifth Claim for Relief, Kouno realleges paragraphs 1 through 11 of this complaint, and further alleges that:

44. In terminating Kouno from the graduate school, Calvin asserted:

(a) That Kouno's progress in thesis effort was unsatisfactory.

(b) That Kouno had agreed with Calvin that Kouno forfeit his rights in the MAIS program unless Kouno single-handedly obtained a substitute for Beals by the end of Fall term, 1984.

45. Calvin castigated Kouno's thesis effort, without knowing in any way its merit.

46. Calvin claimed the alleged

agreement, knowing that Kouno had not been obliged by any rule or circumstance to make any such agreement with Calvin, and knowing that Kouno had not in fact made any such agreement with Calvin.

47. Said dealing of Calvin with Kouno was willful and malicious.

48. Calvin's frustration of Kouno's academic purpose, disregard of Kouno's rights, and insult and contempt of Kouno's intelligence and sensibilities produced in Kouno great mental distress.

WHEREFORE, Kouno demands that the court award Kouno, against Calvin, $10,000.00 (ten thousand dollars) for general mental distress and $10,000.00 (ten thousand dollars) as punitive damage.

COUNT SIX

[Grigsby and Crisp,
in individual capacity]

(Breach of contract
and outrageous conduct)

For his Sixth Claim for Relief, Kouno realleges paragraphs 1 through 13 of this complaint, and further alleges that:

49. In grievance hearing sessions held on February 8 and 22, 1985, Grigsby and Crisp asserted:

(a) That Kouno's scholarship was not in question.

(b) That the fault in Kouno's predicament lay in Kouno's not having obtained a contract with Beals personally, to the effect that Beals not withdraw his academic aegis to Kouno at will.

50. Subsequently, Grigsby and Crisp upheld Calvin without providing Kouno any written statement of their grounds, denying Kouno's request for their opinion on the duplicity of the Beals and Smith letters.

51. Grigsby and Crisp's arguments placing the blame on Kouno has no support

in fact or reason in the case.

52. Said dealing of Grigsby and Crisp's with Kouno was willful and malicious.

53. Grigsby and Crisp's frustration of Kouno's academic purpose, disregard of Kouno's rights, and insult and contempt of Kouno's intelligence and sensibilities produced in Kouno great mental distress.

WHEREFORE, Kouno demands that the court award Kouno, against Grigsby and Crisp respectively, $10,000.00 (ten thousand dollars) for general mental distress and $10,000.00 (ten thousand dollars) as punitive damage.

COUNT SEVEN

[Byrne, in individual capacity]

(Breach of contract

and outrageous conduct)

For his Seventh Claim for Relief, Kouno realleges paragraphs 1 through 17 of

this complaint, and further alleges that:

54. Prior to Byrne's dismissing Kouno from OSU, Kouno requested Byrne's opinion as to the propriety of the Beals and Smith letters, and requested Byrne to supply an official occasion for Kouno to respond to the allegations of the Beals letter.

55. Byrne upheld Calvin without grounds which Byrne could, in good faith, view as valid.

56. Said dealing of Byrne with Kouno was willful and malicious.

57. Byrne's frustration of Kouno's academic purpose, disregard of Kouno's rights, and insult and contempt of Kouno's intelligence and sensibilities produced in Kouno great mental distress.

WHEREFORE, Kouno demands that the court award Kouno, against Byrne, $10,000.00 (ten thousand dollars) for general mental distress and $10,000.00 (ten

thousand dollars) as punitive damage.

COUNT EIGHT:

[All named defendants,

in individual capacity]

(Invasion of Privacy)

For his Eighth Claim for Relief, Kouno realleges all foregoing paragraphs of this complaint, and further alleges that:

58. O.R.S. 351.070(2) prohibits OSU officials from access to confidential student records at OSU, unless they act in the student's educational interests.

59. Throughout the events recounted herein, the defendants freely availed themselves of Kouno's privileged educational records at OSU, not for Kouno's sake, but to clothe their acts in color of legitimacy, so to do damage to Kouno.

WHEREFORE, Kouno demands that the court award Kouno, against each of the

named defendants, $10,000.00 (ten thousand dollars) as punitive damage.

COUNT NINE

[All named defendants,
in individual capacity]
(Conspiracy to breach contract)

For his Nineth Claim for Relief, Kouno realleges paragraphs 1 through 57 of this complaint, and further alleges that:

60. At the time of Byrne's dismissing Kouno from OSU, the named defendants substantially knew of each other's conduct with Kouno.

61. At the time of Byrne's dismissing Kouno from OSU, each of the named defendants had it in his power to rectify the misdeeds of other defendants against Kouno.

62. The failure of the named defendants to rescue Kouno from his predicament contrived by them was willful, and was

based on their reciprocal understandings.

63. Kouno's MAIS research investigating the cause, cure, prevention and the social significances of certain established major illnesses of the brain, was seeing great substantive success.

64. OSU's endorsement is highly material to the practical establishment of Kouno's research success, and to its swifter benefit to a large fraction of the world population who suffer, or are destined to suffer, from the illnesses.

65. Kouno suffered special and great mental distress due to the defendants' frustrations of his moral purposes in his research.

66. OSU's endorsement is highly material to the advancement of Kouno's financial status, estimable in millions of dollars.

WHEREFORE, Kouno demands that the court award Kouno, against each of the

named defendants, $10,000.00 (ten thousand dollars) for special mental distress or as special punitive damage, and against the named defendants collectively, $1,000,000 (one million dollars) for Kouno's future life opportunities, experience and earnings lost.

Kouno prays that the defendants be required to pay Kouno the costs of this action and reasonable attorney's fees which Kouno may incur.

Kouno further prays that, in all of the Counts herein, Kouno have such other and further relief as is just under any common law or state or federal statute.

Respectfully submited

(SIGNED)

James T. Kouno, plaintiff pro se
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Corvallis, Oregon 97333
TEL (503) 757-0738

(FILED JUNE 8, 1988,
ENTERED JUNE 10, 1988)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

JAMES T. KOUNO,	)	
	)	
Platintiff,	)	Civil No.
	)	85-6227-E
v.	)	
	)	ORDER
OREGON STATE BOARD	)	
OF HIGHER EDUCATION,	)	
KENNETH L. BEALS,	)	
COURTLAND L. SMITH,	)	
TOM E. GRIGSBY,	)	
LLOYD E. CRISP,	)	
LYLE D. CALVIN, and	)	
JOHN V. BYRNE,	)	
	)	
Defendants.	)	
----------	)	

Defendants' motion to dismiss this acdtion for lack of subject matter jurisdiction is GRANTED.

IT IS SO ORDERED.

DATED this 8 day of June, 1988.

(SIGNED)

Owen M. Panner
United States District Judge

(FILED JUNE 8, 1988,
ENTERED JUNE 10, 1988)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

JAMES T. KOUNO,	)	
	)	
Platintiff,	)	Civil No.
	)	85-6227-E
v.	)	
	)	JUDGMENT
OREGON STATE BOARD	)	
OF HIGHER EDUCATION,	)	
KENNETH L. BEALS,	)	
COURTLAND L. SMITH,	)	
TOM E. GRIGSBY,	)	
LLOYD E. CRISP,	)	
LYLE D. CALVIN, and	)	
JOHN V. BYRNE,	)	
	)	
Defendants.	)	
----------	)	

Based upon the record,

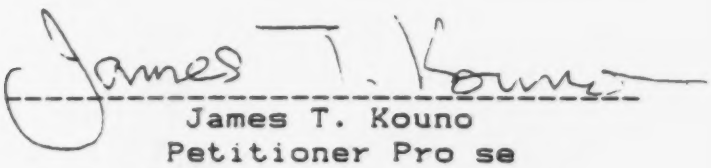
IT IS ORDERED AND ADJUDGED that this action is dismissed for lack of subject matter jurisdiction.

DATED this 8 day of June, 1988.

(SIGNED)

Robert M. Christ,
Clerk of the Court

The foregoing PETITION FOR WRIT OF CERTIORARI in 81 pages, inclusive of the appendix, is respectfully submitted to the Supreme Court of the United States by



James T. Kouno
Petitioner Pro se
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No. 89-1708

In the Supreme Court of the United States

OCTOBER TERM, 1989

JAMES T. KOUNO

Petitioner,

v.

OREGON STATE BOARD OF HIGHER EDUCATION, KENNETH L. BEALS, COURTLAND L. SMITH, LYLE D. CALVIN, JOHN V. BYRNE, TOM E. GRIGSBY, and LLOYD E. CRISP,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

DAVE FROHNMAYER
Attorney General of Oregon
JAMES E. MOUNTAIN, JR.
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Counsel for Respondents

*Counsel of Record

QUESTION PRESENTED

Whether the eleventh amendment bars petitioner's suit against the Oregon State Board of Higher Education, and against the individual academic employees named in petitioner's complaint, when: (1) the suit is based solely on state law claims; and (2) the suit is related only to the individual respondents' actions as members of the university faculty "in academic/educational transactions," (Pet. Cert. at 20).

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TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

Other Authorities

BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents accept, as adequate for review, petitioner's reference to the opinions below and his statement of jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions petitioner quotes, the following provisions of Oregon Revised Statutes are pertinent.

Or. Rev. Stat. § 351.010 provides:

> The Department of Higher Education shall be conducted under the control of a board of 11 directors, to be known as the State Board of Higher Education. Two shall be students admitted at different public institutions of higher education in Oregon at the time of their appointment.

Or. Rev. Stat. § 351.070(1)(a), (2)(e), (3) provides:

> (1) The State Board of Higher Education may, for each institution under its control:
>
> (a) Appoint and employ a president and the requisite number of professors, teachers and employees, and prescribe their compensation and tenure of office or employment.
>
> (2) Subject to such delegation as the state board may decide to make to the institutions, divisions and departments under its control, the State Board of Higher Education may, for each institution, division and department under its control:
>
> . . . .
>
> (e) Pursuant to the procedures described in ORS 351.065, adopt rules relating to the use of and access to student records of the institutions including the

opportunity to challenge inaccurate information placed in student records. However, except for directory information, records containing information kept by the institution, division or department concerning a student and furnished by the student or by the institution, division or department, including, but not limited to, information concerning discipline, counseling, membership activity, academic performance or other personal matters, shall not be available to public inspection or disclosure for any purpose except with the written consent of the student who is the subject of the record or upon order of a court of competent jurisdiction or, in an emergency, to appropriate persons if such information is necessary to protect the health or safety of the student or other persons. Nothing contained in this paragraph prohibits authorization of the inspection of such records by institution officials or employees who have a legitimate educational interest in inspecting student records, or by any representative of a state or federal governmental agency that is required by law to inspect student records. Rules may be adopted permitting release of personally identifiable information in connection with financial aid for which a student has applied or which a student has received. Directory information shall be defined by rules adopted by the State Board of Higher Education.

. . . .

(4) As used in subsection (2) of this section, "legitimate educational interest" means the demonstrated need to know by those officials of an institution who act in the student's educational interest, including faculty, administration, clerical and professional employees, and persons who manage student record information.

Or. Rev. Stat. § 351.072(1)(a) provides:

(1) Notwithstanding ORS 183.310 to 183.550, the following actions may be taken by the State Board of

Higher Education or the educational institutions under its control without compliance with the rulemaking provisions of ORS 183.310 to 183.550:

(a) Adoption of standards, regulations, policies or practices by any of the educational institutions under the control of the State Board of Higher Education relating primarily to admissions, academic advancement, classroom grading policy, the granting of academic credits, granting of degrees, scholarships and similar academic matters.

Or. Rev. Stat. § 352.002 provides:

The State System of Higher Education consists of the programs, activities and institutions of higher education under the jurisdiction of the State Board of Higher Education including the following:

(1) The University of Oregon.

(2) Oregon State University.

(3) Portland State University.

(4) Oregon Health Sciences University.

(5) Oregon Institute of Technology.

(6) Western Oregon State College.

(7) Southern Oregon State College.

(8) Eastern Oregon State College.

Or. Rev. Stat. § 352.004 provides:

The president of each university and college is also president of the faculty. The president is also the executive and governing officer of the school, except as otherwise provided by statute. Subject to the supervision of the board, the president of the university has authority to control and give general directions to the practical affairs of the school.

Or. Rev. Stat. § 30.285 provides:

(1) The governing body of any public body shall defend, save harmless and indemnify any of its

officers, employees and agents, whether elective or appointive, against any tort claim or demand, whether groundless or otherwise, arising out of an alleged act or omission occurring in the performance of duty.

(2) The provisions of subsection (1) of this section do not apply in case of malfeasance in office or wilful or wanton neglect of duty.

(3) If any civil action, suit or proceeding is brought against any state officer, employee or agent which on its face falls within the provisions of subsection (1) of this section, or which the state officer, employee or agent asserts to be based in fact upon an alleged act or omission in the performance of duty, the state officer, employee or agent may, after consulting with the Department of General Services file a written request for counsel with the Attorney General. The Attorney General shall thereupon appear and defend the officer, employee or agent unless after investigation the Attorney General finds that the claim or demand does not arise out of an alleged act or omission occurring in the performance of duty, or that the act or omission complained of amounted to malfeasance in office or wilful or wanton neglect of duty, in which case the Attorney General shall reject defense of the claim.

STATEMENT OF THE CASE

Petitioner Kouno, a Japanese citizen, brought suit in federal district court against the Oregon State Board of Higher Education and six named persons. The following summary of the facts is taken solely from the petitioner's third amended complaint. That complaint recites that the six individuals are sued "in their individual capacity and in their capacity representing OSU as an educational institution." (Complaint, Pet. Cert. at 57). Respondent Byrne is the president of Oregon State University. Respondent Calvin is the dean of the university graduate school. Respondent Smith is the chair of the anthropology department at Oregon

State University. Respondent Beals represented the anthropology department on petitioner's graduate thesis advisory committee; he was the chair of the committee and he served as petitioner's thesis advisor. Respondents Grigsby and Crisp are faculty members who sat on a university grievance committee that heard petitioner's appeal from his dismissal from the graduate school. Petitioner was a graduate student pursuing a master's degree in an interdisciplinary studies program at Oregon State University. (Complaint, Pet. Cert. at 57-69).

According to petitioner's complaint, respondent Beals resigned as petitioner's thesis advisor, and Beals wrote a letter regarding his resignation that was sent to faculty members in the anthropology department. (Complaint, Pet. Cert. at 63). Petitioner alleges that the letter contained false statements about his academic efforts, that the circulation of the letter violated state law regarding the confidentiality of student academic records, and that it embarrassed him. (Complaint, Pet. Cert. at 63-68).

According to the complaint, Beals falsely told petitioner that he could receive a degree "by resolution, without regard to [his] thesis work." (Complaint, Pet. Cert. at 68). Smith, the chair of the anthropology department, then told petitioner that he would have to agree with this resolution, and that the department could not offer petitioner further help with his research because "its faculty, including Beals, lacked knowledge in Kouno's research topic." (Complaint, Pet. Cert. at 64). Smith "demanded" that petitioner move out of his department office. (Complaint, Pet. Cert. at 69).

Calvin, the dean of the graduate school, later dismissed petitioner from the school. Calvin told petitioner that his "thesis effort was unsatisfactory." (Complaint, Pet. Cert. at 71).

"Pursuant to OSU rules," petitioner appealed Calvin's decision to a university grievance committee consisting of

respondents Grigsby and Crisp and a student, who is not named in the complaint. (Complaint, Pet. Cert. at 61). The committee "upheld" Calvin's decision to dismiss petitioner from the graduate school, allegedly "without asserting any academic or disciplinary ground." (Complaint, Pet. Cert. at 61).

Again, "pursuant to OSU rules," petitioner appealed his dismissal to respondent Byrne, the university president. (Complaint, Pet. Cert. at 61). "Byrne upheld Calvin without grounds which Byrne could, in good faith, view as valid." (Complaint, Pet. Cert. at 75).

Petitioner sued for breach of contract, outrageous conduct, invasion of privacy, libel, fraud, and conspiracy. His third amended complaint presented only state law claims; no constitutional claims were pled. (Opinion, Pet. Cert. at 51). He sought his reinstatement in the graduate program and the formation of a new thesis committee. He also sought damages from Beals, Smith, Calvin, Grigsby, Crisp and Byrne.

The district court granted the respondents' motion to dismiss the action for lack of subject matter jurisdiction. The district court concluded that "all [petitioner's] claims derive exclusively from [his] academic performance and the faculty's response to it." and that "the state is the real party in interest." (Opinion, Pet. Cert. at 55). The Ninth Circuit affirmed.[1]

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[1] In his petition, Kouno candidly acknowledges that his appeal from the district court judgment was "not necessarily timely." (Pet. Cert. at 26). Petitioner filed his appeal more than 30 days after the entry of the judgment. Thus, his appeal from that judgment was timely only if he filed a motion that tolls the time for appeal.

After the entry of the judgment, plaintiff did file what he termed a Rule 52(b) motion for reconsideration. Such a motion tolls the time for appeal, Fed. R. App. P. 4(a)(4)(iii), but the motion applies only to an action "tried upon the facts," and not to one dismissed for lack of subject matter jurisdiction, as this case was. Fed. R. Civ. P. 52(a). The district court treated petitioner's post-judgment motion as a Rule 60(b) motion for relief from the

(Footnote continued on next page)

REASONS FOR DENYING CERTIORARI

Kouno's petition raises six issues. He contends that his suit is not one brought against the state and that it is not barred by the eleventh amendment. As an adjunct to this contention, he asserts that the fact that the state would indemnify the individual respondents for any damages awarded against them does not implicate the eleventh amendment or convert this action into one brought against the state. He contends that the district court misread his complaint, and that the court relied upon facts which are not apparent from the complaint, and which petitioner disputes. Finally, he argues that, to the extent that they are inconsistent with his contentions, *Board of Curators, Univ. of Mo. v. Horowitz*, 435 U.S. 78 (1978); *Regents of University of Michigan v. Ewing*, 474 U.S. 214 (1985), and *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984), should be overruled or clarified.

This response will discuss each issue, but not separately. The response will first consider the eleventh amendment issues, including petitioner's request that some of this Court's earlier decisions should be reexamined, and then the response will turn to petitioner's assertions that the district court misread his complaint.

I. The Eleventh Amendment Bars this Action.

The eleventh amendment bars a federal court suit "in which the State or one of its agencies or departments is named

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(Footnote continued from previous page)

judgment, and denied it. Petitioner filed a timely appeal from this order; however, a Rule 60(b) motion does not extend the time for appeal from the underlying judgment.

The state argued below that only the denial of petitioner's Rule 60(b) motion was properly before the circuit court of appeals because petitioner had not filed a timely appeal from the judgment and the Rule 60(b) motion did not extend the time for appeal from the judgment itself. Nonetheless, the ninth circuit reviewed and affirmed the district court judgment. (Memorandum, Pet. Cert. at 47).

as the defendant." *Pennhurst State School & Hosp. v. Halderman, supra*, 465 U.S. at 100. One of the defendants in this case is the Oregon State Board of Higher Education. The Oregon Supreme Court has held, as a matter of state law, that an action brought against the State Board of Higher Education is in reality one brought against the state. *James & Yost, Inc. v. State Bd. of Higher Educ.*, 216 Or. 598, 340 P.2d 577 (1959).

When, as here, the only issues presented are ones of state law, then irrespective of the nature of the relief that is sought "[t]he Eleventh Amendment [also] bars a suit against state officials when 'the state is the real, substantial party in interest.' *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 464 (1945)." *Pennhurst State School & Hosp. v. Halderman, supra*, 465 U.S. at 101. In determining whether a suit ostensibly brought against an individual state official is in actuality one brought against the state,

> "The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.' " *Dugan v. Rank*, 372 US 609, 620 (1963) (citations omitted).

Pennhurst State School & Hosp. v. Halderman, supra, 465 U.S. at 101, n. 11.

In this case, all aspects of this test are met. A judgment for petitioner would interfere with the administration of a state university; it would compel the university to act; and it would be paid from the public treasury.

The individual respondents are academic officers and faculty members of Oregon State University. They are employees of the state. Or. Rev. Stat. § 351.070(1)(a). Petitioner acknowledges that "[i]n all incidences recounted in the com-

plaint, the defendant teachers acted in their capacity as [petitioner's] teacher[s] performing the substance of their academic conduct with him." (Complaint, Pet. Cert. at 32). Part of the relief that petitioner seeks in his complaint is his reinstatement in the university graduate program from which he was dismissed, and the formation of a new thesis advisory committee. This relief, if granted, would compel the state to act, it would significantly interfere with the academic administration of this state university, and it would impinge upon "the prerogatives of state . . . educational institutions and [upon the courts'] responsibility to safeguard their academic freedom." *Regents of University of Michigan v. Ewing*, *supra*, 474 U.S. at 226.

An award of monetary damages against the individual defendants, based on their conduct in supervising and evaluating petitioner's performance as a graduate student, also would threaten academic freedom and hamper the university's administration of its academic affairs.

> If a "federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies," *Bishop v. Wood*, 426 U.S. 341, 349 . . . (1976), far less is it suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions—decisions that require "an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking." *Board of Curators, Univ. of Mo. v. Horowitz*, [*supra*] 435 U.S. at 89-90.

Regents of University of Michigan v. Ewing, *supra*, 474 U.S. at 226.

Although petitioner argues, unpersuasively, that *Horowitz* and *Ewing* should be overruled or "clarified," much of his

argument is in fact premised upon similar decisions that also stress the principle of academic freedom. As the district court judge noted,

> [Petitioner] cites *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), which concerned the legislative limits of inquiry regarding a state university faculty member who refused to answer certain questions regarding political affiliations. He cites a similar case, *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967), which concerned teacher loyalty oaths. He cites *Epperson v. Arkansas*, 393 U.S. 97 (1968), which concerned the constitutionality of a statute prohibiting the teaching of evolution. Finally, he cites *Board of Curators v. Horowitz*, [*supra*], which concerned the adequacy of constitutional due process in an academic setting when a student is terminated from a program. These cases stand for certain legislative restrictions or constitutional imperatives in the academic arena. They do not, as [petitioner] suggests, stand for the proposition that faculty members are not agents of the state.

(Opinion, Pet. Cert. at 53-54).

Petitioner's argument appears to be based upon a misunderstanding of *Keyishian v. Board of Regents*, *supra*, and of the other cases upon which he relies. He appears to reason that, if the state and the judiciary may not impinge upon certain areas of academic freedom, an academician must act solely as an individual within those areas and not as an agent of the state. This is the apparent import of assertions such as that a state university professor is an agent of the state "only when the teacher is essentially a passive victim in a circumstance in which the government has affirmatively placed him," but not in "the teacher's academic relationship with his student." (Pet. Cert. at 30).

One major flaw in this argument is that, in the guise of protecting academic freedom, it would seek to reduce that very

freedom. Academic freedom is not the freedom to be sued; and although state control of state universities is subject to constitutional limitations, nonetheless " '[b]y and large, public education in our Nation is committed to the control of state and local authorities.' *Epperson v. Arkansas*, [*supra*]." *Board of Curators, Univ. of Mo. v. Horowitz*, *supra*, 435 U.S. at 91.

In sum, the real party in interest here is the state. As the district court found, "the individual defendants [are] nominal defendants only [who] acted as agents of the state." (Complaint, Pet. Cert. at 55). In holding that state officials are not "persons" within the meaning of 42 U.S.C. § 1983, this Court recently observed that,

> [A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. *Brandon v. Holt*, 469 U.S. 464, 471 . . . (1985). As such, it is no different from a suit against the State itself. See, *e.g.*, *Kentucky v. Graham*, 473 U.S. 159, 165-166 . . . (1985); *Monell* [*v. New York City Dept. of Social Services*, 436 U.S. 658] *supra*, at 690, n. 55 . . . [(1978)].

Will v. Michigan Dept. of State Police, 491 U.S. ___, 109 S.Ct. 2304, 2311 (1989).[2] This suit also is no different from a suit against the state.

Petitioner asserts that the district and circuit courts have held that his suit is barred by the eleventh amendment solely because the state would pay any damages that might be awarded against the individual respondents in this case. Or. Rev. Stat. § 30.285(1). (Pet. Cert. at 35-36). Petitioner misinterprets the lower court decisions and the argument respondents made below. Respondents have not argued, and

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[2] Petitioner argues that *Pennhurst State School & Hosp. v. Halderman*, *supra*, should be overruled or limited. He presents no persuasive reason for reexamining *Pennhurst*, a decision relied upon in this Court's 1989 decision in *Will*.

the lower courts have not held, that the state is the real party in interest here solely because the state would indemnify the individual respondents for any damages awarded against them. Whatever the merits of such an argument may be, *see Davis v. Harris*, 570 F. Supp. 1136, 1139 (D. Or. (1983), *Hallmark Clinic v. North Carolina Dept. of Human Res.*, 380 F. Supp 1153, 1159-60 (E.D. N.C. 1974), *aff'd* 519 F.2d 1315 (4th Cir. 1975), the state's (and, the state believes, the lower courts') point here is that the fact that the state would pay any damages awarded against these individuals is simply another, but not the sole, factor indicating that the state is in fact the real party in interest. The point is that any damages "will obviously not be paid out of the pocket[s]" of the individual defendants. *Edelman v. Jordan*, 415 U.S. 651, 664 (1974). *See also Cory v. White*, 457 U.S. 85, 90 (1982).

II. The District Court Correctly Dismissed the Complaint.

In his petition, Kouno asserts that the district court misinterpreted his complaint in certain respects, and that the court misapplied the standard for review of the sufficiency of a complaint.

Even if these assertions were correct, they would not establish that this case merits a grant of certiorari. At most, this case would then involve an incorrect application of a correct legal standard of review. The district court noted its obligation to "construe the allegations in the complaint most favorably to the pleader," and to dismiss only if "it appears beyond doubt that the plaintiff can prove no set of facts in suport [*sic*] of his claim which would entitle him to relief," *quoting* from *Conley v. Gibson*, 355 U.S. 41, 45-45 (1957). (Opinion, Pet. Cert. at 51). Plaintiff does not contend that the district court misstated these well-settled legal principles.

The district court also did not misapply these principles. Petitioner asserts that the district court found, contrary to the complaint, that petitioner's "academic performance was inadequate." (Pet. Cert. at 39). The district court, however, made no such finding. The court merely noted, accurately, that petitioner's claims all "derive[d] exclusively from his academic performance and the faculty's response to it." (Opinion, Pet. Cert. at 55).

Petitioner also contends that "the lower courts [found] that the thesis advising committee rejected [his] thesis effort and terminated him from the program. This finding has no support in the complaint." (Pet. Cert. at 37). The district court's opinion and the complaint concededly differ as to who told petitioner that his thesis was unsatisfactory. The district court did state that plaintiff's thesis was rejected *by the thesis committee.* (Opinion, Pet. Cert. at 50). In contrast, the complaint recites that *the dean of the graduate school* told petitioner that "progress in [his] thesis effort was unsatisfactory," (Complaint, Pet. Cert. at 71) and that the dean dismissed petitioner from the graduate school. (Complaint, Pet. Cert. at 61). This discrepancy, however, between the complaint's allegations and the district court's conclusions is legally insignificant and it does not merit this Court's review.

CONCLUSION

The petition for writ of certiorari fails to present the Court with any substantial basis why the case merits review. Petitioner's claims correctly were barred by the eleventh amendment, and petitioner has failed to suggest any persuasive reason for the Court to reexamine its settled eleventh amendment jurisprudence. Beyond that, petitioner merely invites the Court to make a fact-bound review of the sufficiency of his complaint on the basis of a legally insignifi-

cant factual discrepancy. This Court should decline that invitation, and the petition for writ of certiorari should be denied.

Respectfully submitted,

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(3)

NO. 89-1708

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

JAMES T. KOUNO,

PETITIONER,

V.

OREGON STATE BOARD OF HIGHER EDUCATION; KENNETH L. BEALS; COURTLAND L. SMITH; LYLE D. CALVIN; JOHN V. BYRNE; TOM E. GRIGSBY; LLOYD E. CRISP,

RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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Petitioner Pro Se
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Cases

Reply to Brief in Opposition

Under Supreme Court Rule 15.6, Kouno rebuts the respondent new argument on the reviewability of this case, and their new arguments on the importance of the review. Kouno rebuts also their premature arguments on the merits.

REVIEWABILITY

Timeliness of Appeal from Judgment (Br. in Opp., 6-7, foot note).

The respondents invite the Court to find a procedural error on Kouno's part.

Rebuttal: (1) The makers of the judicial rules do not, for any occasion, provide, or did not, at least, in F.R.C.P. 52(a) provide, that the litigants may not question to the federal district court its judgment, in its very first instance, since their providing such would be to elevate the district court to an unreasonable intellectual paragonhood and autocracy. F.R.C.P. 52(a) says only that, in

cases of certain species of judgment on motion, the court need not necessarily, or automatically, issue the findings of fact and the conclusions of law, as there may clearly be no call for them. The rule does not peculiarly in said cases penalize the litigant for desiring them, or, where the court has issued them under this rule, as in this case, for requesting their vacation, revision or clarification. United States v. Dieter, 429 U.S. 6 (1976); Williamson v. Tucker, 645 F.2d 404 (5th Cir. 1981).

Also, for reasons evident below, F.R.C.P. 41 (b) applied.

The Opinion and the Judgement of the district court were entered 06/10/1988. The motion of Kouno requesting the court their vacation, revision or clarification was filed 06/23/1988. This motion, characterized by the court as a Rule 60(b) motion, qualified in its content as a Rule

52(b), a Rule 59(b) and a Rule 59(e) motion. Under F.R.C.P. 52(b), 59(b), 59(e) and 6(a), this motion was timely as any of these motions. Therefore, under F.R.A.P. 4(a)(4), it tolled the time to appeal from the judgment. Accordingly, the appeals court took jurisdiction over the judgment, and affirmed it, through a proceeding which "[t]erminated on the Merits" (appeals court docket entry, 11/15/89). Thus, the presence of this ruling of the appeals court, now before this Court is legitimate and final.

(2) Even if the motion were a rule 60(b) motion, the judgment would be for this Court's review, as follows.

As the petition presents, there militate against the Opinion and the judgment points of fact and those of law, which are, or, at least, conceivably by Kouno and the public are, plainly decisive in Kouno's favor, and not ever to be ignored

or overlooked by the court. Therefore, under F.R.C.P. 60(b)(6), relief from the operation of the judgment for any reason justifying the relief, and F.R.C.P. 60(b)(1), mistake, inadvertence, surprise, or excusable neglect, Kouno is entitled to a reversal of the rulings below and a resolution of his bewilderment, or, under the latter provision, in any case, to statements of this Court resolving his bewilderment.

IMPORTANCE

(1) State statutes (Br. in Opp., 1-4, 8).

The respondents argue that Oregon statutory provisions make the OSU teacher a "state employee," i.e., a state agent and/or ward, in the substance (i.e., the essence, rather than mere incidents) of his academic conduct with his student.

Rebuttal: Oregon statutory provisions are presently not pertinent. The question of the capacity or privilege of

the teacher is not a question of the state's intention to confer upon him the state-agentship or state-wardship, but, as below, a question of its intention in conferring it, of its power to confer it, of the teacher's intention in accepting it, and of his power to accept it.

The Oregon statutory provisions cited by the respondents give no support to them. Rather, O.R.S. 351.072(1)(a) (Br. in Opp., 2-3), in effect, acknowledges the opposite of their contention.

Kouno is suing the Board merely to obtain thereby replacement defendants from the Board, for the purpose of injunctive reliefs from OSU, in cases of departure of the defendant teachers from their OSU office. To any extent that the Board is a state agency in this context, it is merely a symbol. To any extent that the Board's role is substantial in this context, it is a corporation independent from the state.

(2) 'Pennhurst' (Br. in Opp., 11-12).

The respondents contend that, although the courts below offered as a basis for their ruling, that the statutory state indemnification, in itself, is sufficient to make Kouno's suit one against the state, (1) they did not therein appeal to any authority, and, since (2) they did not base their ruling solely on this theory, as (according to the respondents) Kouno said they did (Pet. Cert., 35-36), (3) even if they erred in resorting to this theory, and even if they appealed therein to authorities from this Court, the error and the appeal would be inconsequential.

The district court, and the affirming appeals court, raised as a ground for their ruling state indemnification under O.R.S. 30.285(1) (Pet Cert., 52), not common law state indemnification which might have been postulable purely on the basis of the substance of the relationship

between the state and the defendant teachers. Thus, the courts said that the statutory state indemnification, in itself, i.e., without regard to the substance of the relationship between the state and the teachers, made Kouno's suit one against the state. The respondents admit that the courts thus opined, and attempt to supply an excuse. The opinion of the courts is untenable, as the respondents admit.

Rebuttals: (1) Indeed, the courts do not attribute their inspiration for their indicated fallacy to any authority. But, they maintain that the fallacy is accommodated by Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945), Edelman v. Jordan, 415 U.S. 651 (1974), and Pennhurst State School and Hosp. v. Halderman, 465 U.S. 89 (1984). To this extent the courts appeal in said fallacy of theirs to these authorities. Also, in allowing themselves to be, to said extent, parties to the

fallacy, these authorities fail.

(2) Kouno did not contend that the courts based their ruling solely on the statutory state indemnification.

(3) Said fallacy of the courts below, their appeal therein to said authorities from this Court, and said failure of the authorities, are not inconsequential, since the other ground, seeming, of the courts below for their ruling, i.e., the teachers' drawing stipend through the Board, is not good.

(3) The 'Conley' Rule (Br. in Opp., 12).

The respondents appear to contend thus (authorities?): In its dismissing of Kouno's action, the district court applied to its deliberation the rule of Conley v. Gibson, 355 U.S. 41, at 45-46 (1957): "[Dismiss only if] it appears beyond doubt that the plaintiff can prove no set of facts...entitl[ing] him to relief." This rule was the appropriate standard. The

court's error, if any, which would be merely incidental to the court's proper judicial exertion under this rule, would not be reversible.

Rebuttal: Kouno is sueing the teachers as teachers acting in academic freedom, for the substance of their academic conduct with Kouno. The courts below ruled that the teachers are, in this context, state agents and/or wards, as a matter purely of the authority of laws.

The capacity or privilege of the teachers is not a matter of the authority of laws. It would not even be a matter of law, except with a basis in facts in the substance of the relationships among the state, the teachers and Kouno. The courts below refused to consider these facts. Also, while thus acting, the courts had, as below, occultly admitted that the teachers had acted with Kouno as categorically independent and private parties; and

postulated that the teachers, as such parties, were immune from Kouno's claims. These behaviors of the courts, Kouno said, do not qualify as proper judicial exertions under Conley (Pet. Cert., 35).

(4) The Findings (Br. in Opp., 13).

The respondents contend the following: (1) The district court said only that the teachers said that Kouno's academic performance was inadequate, and that their deciding of such questions is a part of their academic conduct. (2) The arbitrariness of the finding re the thesis committee is immaterial.

Rebuttal: Kouno's rights with the teachers on academic contract with them are, as below, 14th Amendment rights. The teachers deprived these rights of Kouno, as below, as a matter purely of their categorically personal academic-professional rights, not the state's rights; under color purely of their categorically

personal scholarly authority, not any public law; purely on their categorically personal academic-professional discretion, not pursuant to any public law, i.e., not through any process of law, let alone due proces of law. Therefore, there is no official immunity for the teachers against Kouno's claims on these rights, even if they acted 'as state agents.' Indeed, they are especially liable personally, if they so acted. Thus, to avail the teachers the 11th Amendment immunity, the court had to negate these claims. Therefore the court asserted, negating Kouno's claims most distinctly such claims, "[Kouno] did not make adequate academic progress" (Pet. Cert., at 49), that the committee rejected Kouno's thesis effort and terminated him from the academic degree program (at 50), and that the allegation of the teachers was permissibly in them personally a part of the substance of their academic conduct

with Kouno (at 55).

Thus, as described in the petition (25-26, 37-40), the court made the arbitrary findings, deliberately, crucially to the judgment.

MERITS

Academic Freedom (Br. in Opp., 10-11).

The respondents state:

> [Kouno] appears to reason that, if the state and the judiciary may not impinge upon certain areas of academic freedom, an academician must act solely as an individual within those areas and not as an agent of the state...
>
> Academic freedom is not the freedom to be sued; and although state control of state universities is subject to constitutional limitations, nonetheless "'by and large, public education in our Nation is committed to the control of state and local authorities,' Epperson v. Arkansas,

[supra]," Board of Curators, Univ. of Mo. v. Horowitz, supra.

Rebuttal: Governments have certain authority dominant over the authority of individual citizens, in civism, and in education in civism ("civic education"), e.g., aspects of the education of the minors, driving schools. The person licenced and/or active as a teacher or an official tester in civic education is an agent of the authoritative government, to the extent of his duties in the implementing of the will of that government. Also, the person thus active in civic education in the public institution is an employee of the government in charge of the institution, in the good faith substance of his civic educational conduct in his job.

As below, the U.S. Constitution forbids governments in the U.S. to promote or sponsor as estimable in itself scholarship as an undertaking or way of life. How-

ever, the governments are free to promote or sponsor scholarship, for their public's satisfactions indifferent to scholarship, which their promoting or sponsoring of scholarship induces.

Scholarship is a distinct, inherently spiritual, and fundamentally rational undertaking or way of life, to which circumstances inspire or enable individuals, in various ways and degrees. Therefore, the community of interacting scholars pondering in their scholarship scholarly subjects, or the subject of scholarship, ("scholarly community"), is inherently a private enclave in the general society; with mores ("scholarly mores") which consist of original elements rightfully important and private to that community, in addition to the mores basic to the general society ("civic mores"). Also, education in scholarship,, e.g., the higher and the professional education, ("scholarly educa-

tion"), as a dialogue between the teacher and the student, as scholars, on scholarly subjects, or on the subject of scholarship, is an affair purely of the scholarly community. Recognizing these facts, the academic freedom doctrine says, in effect, the following: (1) Scholarship is a religion in the meaning of the First Amendment; governments shall not compel or suppress it, or encourage or discourage it. (2) Governments cannot, through any mechanism, in any way, condition, qualify or perturb any affair purely of the scholarly community, e.g., scholarly education. They shall not attempt to do so. (3) The defendant in a controversy purely of the scholarly community is amenable to prosecution only as a private party, only to private parties, only on the basis of the scholarly mores, not merely of the civic mores. Nothing more, nothing less. The respondents' notion that academic freedom

means a freedom of the (state school?) teacher, (as a hierarch of scholarship as a state religion?), from suit by his student is mistaken.

The passage in Epperson v. Arkansas, 393 U.S. 97, at 104 (1968), cited by the respondents, occurs in a statement to the effect that (1) governments have authority over civic education, and have the authority to promote or sponsor scholarly education; (2) they have not any authority over scholarly education. In Board of Curators of University of Missouri v. Horowitz, 435 U.S. 78, at 91 (1978), it occurs in a remark, with an allusion to Barnard v. Inhabitants of Shelburne, 216 Mass. 19, 102 NE 1095 (1913), to the effect that the jurisdiction over a dispute between the public school student and the school authority, arising in their schoolish affairs belongs primarily to the government in charge of the school, if it belongs to

any government; the federal government's jurisdiction definitely does not reach the dispute, where the dispute is beyond the former government's jurisdiction, as in Barnard and Horowitz. In these illustrative cases the public school student sought the government in charge of the school to modify, affect or supersede for his sake the substance of his teacher's scholarly-educational conduct with him. The court said, in effect, that the government lacks jurisdiction to so act, for the academic freedom principles stated above. Thus, the respondents' notion that the state university teacher is a state agent (or ward) in the substance of his scholarly-educational conduct, because the state is, in that area authoritative over him (or obliged to him), is belied, not supported by these authorities.

Evidently, the respondents, and the courts below, do not perceive the imports

of Horowitz. Kouno sees in this case report roughly the following: The plaintiff sued as a subject and ward of the U.S. and the state, but not as a categorically independent and private scholar; suing the teachers as state agents and wards, or state subjects and wards, but not as categorically independent and private scholars; formally appealing to the civic mores, but not the mores unique, important and private to the scholarly community which are the heart of scholarship, and of the dispute. Thus, the plaintiff failed to supply the Court a dispute or the jurisdiction. Also, the plaintiff thus showed that she did not know the meaning of scholarship. Thus, even though the teachers treated the plaintiff irregularly in the school, that is not necessarily wrong, or litigably wrong, for, in her evident lack of scholarship, the plaintiff might have forfeited

her scholarly rights; and, if so, she should have known that. This consideration, too, was pertinent. Thus, the plaintiff failed not because the teachers were state agents in the context of the suit (they were not), not because they were immune to suit or claims by the plaintiff (they were not), and not because she did not convey irregularities on the teachers' part, of type litigable by the scholar student (she conveyed).

In the lack of plainness in the Opinion of the Court Kouno understands the following: Two alternative theories of recovery become incurably repugnant to each other upon certain posture with which the plaintiff commits himself to one. Where the plaintiff has made, or is in the process of making, so repugnant to each other two alternative theories of recovery available to him, and the theory which he pursues is not good while, evidently to

the court, the other theory might be, or would be, good, the court may find in its path a dilemma, in an incompatibility between, on one hand, 'substantial' justice for the plaintiff and, on the other, the maintenance of judicial neutrality or the avoidance of judicial barratry. The district court in the Horowitz case, and the Court which sat in its place in review, faced and responded to such a dilemma.

CONCLUSION

The respondents do not earnestly dispute, for they cannot, the being of the petitioner's questions before the Court, and their importance.

The finer and the more precise merits of the contentions are yet to be presented by the litigants.

Wherefore, this Court should grant the petitioner the writ of certiorari.

Respectfully submitted,

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